(1)

Supreme Court, U.S.
FILED
JUL 20 2004
OFFICE OF THE CLERK

No. 03-9560

IN THE

Supreme Court of the United States

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 17, 2004
CERTIORARI GRANTED JUNE 28, 2004

TABLE OF CONTENTS

	Page
DOCKET ENTRIES	1
PROPOSED JURY INSTRUCTION D-13	17
PROPOSED JURY INSTRUCTION D-18	19
TRANSCRIPT OF JURY INSTRUCTION CONFERENCE	21
BRIEF OF APPELLANT AT 101-02	38

SUPREME COURT OF MISSISSIPPI
CIRCUIT COURT OF THE STATE OF MISSISSIPPI

No. UK-2000-82

STATE OF MISSISSIPPI,
Plaintiff,

v.

MARLON LATODD HOWELL,
Defendant.

DOCKET ENTRIES

DATE	ORDERS, JUDGMENTS, ETC.
06/29/2000	Indictment filed
06/29/2000	Capias issued and handed to Union County Sheriff
06/30/2000	Capias executed returned and filed
07/25/2000	Waiver of Arraignment and Entry of Plea filed.
07/25/2000	Order filed. Bk 42-504
07/25/2000	State's Response to Request for Discovery and State's Demand for Reciprocal Discovery Filed.
07/26/2000	Rule 9.04 Motion filed.
07/26/2000	Motion to reveal the deal filed.
07/26/2000	Motion for serverance filed.
07/26/2000	Motion to be appraised of order of trial where the death penalty will be sought and which statutory aggravated circumstances the state will rely on filed.

DATE	ORDERS, JUDGMENTS, ETC.
08/04/2000	Subpoena Duces Tecum as to State of Mississippi, Union County filed as to WVTA issued and mailed to attorney filed.
08/09/2000	Motion for continuance filed.
08/09/2000	Subpoena Duces Tecum as to Mickey Baker, Jimmy Parker, & to Personnel Director for New Albany Police Department, (T. Kent D. Grisham, C. Glasson, J. Collier, C. Kenner, N. Treadaway, D. Stout, Jr, B. Kirk issued and mailed to attorney.
08/11/2000	Subpoena Duces Tecum, as to WTVA executed returned and filed.
08/11/2000	Order of setting filed. BK 42 Pages 600-607
08/16/2000	Motion to Quash Subpoena Duces Tecum filed.
08/20/2000	Subpoena Duces Tecum as to Mickey Baker, Jimmy Parker, and Personnel Director for New Albany Police Department executed returned and filed.
08/20/2000	Order allowing attorney's fee and expenses filed. BK 42 P6
08/21/2000	Itemized statement for compensation and expenses of court-appointed counsel filed. BK 42
08/22/2000	State's Motion for Omnibus Hearing filed.
08/22/2000	Motion to Quash Subpoena Duces Tecum filed.
08/28/2000	Petition for Writ of Habeas Corpus Ad Prosequedan filed.
09/01/2000	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
09/01/2000	Writ of Habeas Corpus Ad Prosequendum filed.

DATE	ORDERS, JUDGMENTS, ETC.
09/01/2000	Order for Writ of Habeas Corpus Ad Prosequendum filed. BK 42 page 710
09/05/2000	Order for Deliver of Defendant filed. BK 43 Page 6
09/05/2000	Order for Writ of Habeas Corpus ad Prosequendum filed. BK 43-Page 5
09/05/2000	Motion for Change of Venue (with exhibit "A"-"M") filed.
09/13/2000	Order filed. BK 43-63
09/13/2000	Order filed. BK 43-64
10/30/2000	Order of Setting filed. BK 43 pages 222-227
11/09/2000	State's Response to request for Supplemental Discovery and State's Demand for reciprocal discovery filed.
01/18/2001	State's Response to Request for Supplemental Discovery and State's Demand for reciprocal discovery filed.
02/09/2001	Order setting trial and scheduling order filed. BK 43 p 530
02/09/2001	Order denying motion for change of venue filed. BK 43-531
02/09/2001	Order quashing subpoena duces tecum filed. BK 43-532
02/14/2001	Motion to suppress filed.
02/14/2001	Motion to suppress filed.
02/14/2001	Motion for funds for an investigator filed.
02/14/2001	Motion for additional peremptory challenges filed.

DATE	ORDERS, JUDGMENTS, ETC.
02/14/2001	Motion to suppress identification and testimony filed.
02/14/2001	Motion to prohibit jury dispersal and to prohibit jury's exposure to victims family or friends filed.
02/14/2001	Defendant's Motion in Limine filed.
02/14/2001	Motion for discovery of evidence presented to the Grand Jury in this case filed.
02/14/2001	Motion for Individual Sequestered Voir Dire, and Sequestration of Jurors during Voir dire and throughout the trial filed.
02/14/2001	Motion to control prejudicial publicity filed.
02/14/2001	Motion for Special Venire facias filed.
02/14/2001	Motion to invoke rule prior to Voir Dire, prohibit witness from conversing, and to rejoin the District Attorney from advising witnesses of previous testimony filed.
02/14/2001	Motion to declare unconstitutional the exclusion of 18-20 years old venire persons from the jury to try this case filed.
02/14/2001	Motion to declare unconstitutional the exclusion of illiterates and exemption of over 65 years old venire persons from the jury to try this case filed.
02/14/2001	Motion to disclose the past and present relationships Associations and ties between the district attorney and prospective jurors filed.
02/14/2001	Memorandum of law in support of motion to control prejudical publicity filed.
02/14/2001	Assertion of right to be present filed.

DATE	ORDERS, JUDGMENTS, ETC.
02/14/2001	Motion for opportunity to rehabilitate any prosepective juror who expresses reticence when asked to kill a fellow human being filed.
2/14/2001	Motion to require the State to furnish proposed jury instructions twenty-four hours prior to trial filed.
02/14/2001	Motion for appointment of jury selection consultant filed.
02/14/2001	Motion to strike the death qualification voir dire question and to limit disqualification for particular views on punishment filed.
02/14/2001	Motion for full recordation filed.
02/14/2001	Motion for individual voir dire total recordation and sequestration of jurors during voir dire filed.
02/14/2001	Application for the issuance of the Writ of Habeas Corpus Ad Testificandum filed.
02/14/2001	Application for the issuance of the writ of Habeas Corpus Ad Testificandum filed. (Adam Ray)
02/14/2001	Application for the issuance of the writ of Habeas Corpus Ad testificandum filed. (Curtis Lipsey)
02/14/2001	Rule 9.05 Alibi Defense filed.
02/14/2001	Motion for an order requiring that juror questionnaires be sent with the juror summons to each venire person filed.
02/14/2001	Rule 9.04 Discovery Filed.
02/16/2001	Order of setting filed. BK 43 Pages 541-548

DATE	ORDERS, JUDGMENTS, ETC.
02/21/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
02/26/2001	State's Notice of Aggravating circumstances filed.
02/26/2001	Scheduling Order filed. BK 43-578.
03/01/2001	Petition for psychiatric examination filed.
03/01/2001	Motion to preclude the prosecution form using peremptory challenges to exclude black persons and members of other groups filed.
03/01/2001	Motion for jury view of the execution process filed.
03/01/2001	Motion to assure that mitigation circumstances received their due weight and attention from the jury filed.
03/01/2001	Notice of intent to introduce co-indictees sentences in mitigation filed.
03/01/2001	Motion to instruct jury on three sentencing options and bar any inaccurate speculation concerning the possibility of future release filed.
03/01/2001	Motion to prohibit imposition of Capital Punishment in this case and to preclude the prosecution from seeking to rely on Miss. Code (99-19-101(7)(a)(b)(c) or (d) filed.
03/01/2001	Motion for twenty-four hour cooling off period between conclusion of the Culpability Phase and the start of any sentencing phase fo this trial filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/01/2001	Motion to declare Mississippi's Capital Punishment Scheme Unconstitutional, or, in the alternative, to construe is Statutory Mitigating Circumstances to filed.
03/01/2001	Motion to bar death penalty as cruel, unusual and degrading punishment filed.
03/01/2001	Motion to suppress evidence seized after illegal arrest filed.
03/01/2001	Motion for process instructions filed.
03/01/2001	Motion to preclude the sheriff's department from bringing Mr. Howell into court in shackles, and to limit the number of uniformed officers in the courtroom filed.
03/01/2001	Motion to preclude admission of gruesome and highly prejudicial color photographs of deceased.
03/01/2001	Motion for instruction informing the jury that a life sentence means life without parole in this case filed.
03/01/2001	Motion for opportunity to rehabilitate any prospective juror who expresses reticence when asked to kill a fellow human being filed.
03/01/2001	Motion for compensation of jurors at current wages and for reimbursement of promary care costs filed.
03/01/2001	Motion for disclosure of any possible basis of judicial recusal filed.
03/01/2001	Motion to Bar Admission of inflammatory and prejudicial matters concerning the victims filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/01/2001	Motion for discovery of any possible basis for disqualification of the prosecuting attorney filed.
03/01/2001	Motion to bar use of certain aggravating circumstances filed.
03/01/2001	Motion for limited daily transcripts during trial filed.
03/01/2001	Motion to preclude the State from relying on any Non-statutory aggravating circumstances filed.
03/01/2001	Motion to declare Miss. Code Ann. (97-3-19(2)(e) Unconstitutional, or to preclude the prosecution from relying on Miss. Code Ann. (99-49-101(5)(d) as an aggravating circumstance at defendnat's Capital trial filed.
03/01/2001	Motion to prohibit prosecutorial misconduct filed.
03/02/2001	Petition for Writ of Habeas Corpus Ad Testificandum as to Adam Ray filed.
03/02/2001	Order for Writ of Habeas, Corpus Ad Testificandum filed. BK 43-Page 616
03/02/2001	Writ of Habeas Corpus Ad Testificandum as to Adam Ray filed.
03/02/2001	Petition for Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey filed.
03/02/2001	Order for Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey filed.
03/02/2001	Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey Filed.
03/02/2001	Petition for Writ of Habeas Corpus Ad Testificandum as to Deatrick Knox filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/02/2001	Order for Writ of Habeas Corpus Ad Testificandum as to Deatrick Knox filed. BK 43 page 614
03/02/2001	Writ of Habeas Corpus Ad Testificandum as to Deatrick Knox filed.
03/02/2001	Petition, Order and Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey, Adam Ray and Deatrick Knox faxed to MDOC.
03/05/2001	Request for subpoenas for Monday March, 26, 2001 issued and handed to Union County Sheriff.
03/06/2001	Agreed Order for Psychiatric Examination filed. 43 654-655
03/08/2001	State's response to request for supplemental discovery and state's demand for reciprocal discovery filed.
03/09/2001	Motion to Quash Jury Panel Filed.
03/09/2001	State's response to request for supplemental discovery and state's demand for reciprocal discovery filed.
03/09/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/12/2001	Defendant's Motion in limine filed.
03/12/2001	Motion for Court Appointed Assistance filed.
03/12/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/21/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/22/2001	Application for the issuance of the Writ of Habeas Corpus Ad Testificandum filed.
03/22/2001	Order for Writ of Testificandum filed. BK 44-77
03/22/2001	Writ of Testificandum as to James T. Simmons III filed.
03/22/2001	Order of Writ and Writ of Testificandum faxed to Lee County
03/23/2001	Jury Instruction D-15, D-16, D-17 filed.
03/23/2001	Supplemental Rule 9.04 discovery filed.
03/23/2001	Response to discovery request filed.
03/23/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/23/2001	Jury Instruction No. S-1 thur S-9 filed.
03/23/2001	Sentencing instruction No. 1 thur 4 filed.
03/26/2001	Jury List filed.
03/26/2001	Court Instruction No. 1, 2, 3, and 4 filed.
03/26/2001	Jury Instruction D-1 thur D-18 filed.
03/27/2001	Court's sentencing instruction No. 1, 2, 7, 8 filed.
03/27/2001	Court instruction No. 5 filed.
03/28/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/29/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/30/2001	Sentencing instruction No. 2, filed.
03/30/2001	Order filed. (Court Reporter) Bk 44 P 114
03/30/2001	Jury verdict filed.
03/30/2001	Judgment of the Court and Sentence to death filed.
03/30/2001	Committment order filed.
03/30/2001	Jury Verdict filed.
03/30/2001	Defendant Instruction #1 (Selected Sample Penalty Phase Requests to Charge)
04/06/2001	Motion for new trial filed.
04/16/2001	Affidavit of poverty filed.
04/16/2001	Post-Trial motion to proceed in forma pauperis on appeal filed.
05/14/2001	Notice of hearing filed.
05/17/2001	Petition for Writ of Habeas Corpus Ad Testificandum filed.
05/18/2001	Order Authorizing payment filed. BK 44 P 357-358 (Region III Mental)
05/18/2001	Order Authorizing payment filed. Bk 44, P 359-360 (Steven Hayne)
05/18/2001	Certified copies of Order Authorizing Payment to Steven Hayne and Region III Mental handed to Union County Board of Supervisors.

DATE	ORDERS, JUDGMENTS, ETC.
05/23/2001	Petition for Writ of Habeas Corpus Ad testificandum filed.
05/23/2001	Order for Writ of Habeas Corpus Ad Testificandum filed.
05/23/2001	Order for deliverance of defendant filed.
05/23/2001	Petition, Order for Writ of Habeas and order for deliverance of defendant faxed to MDOC.
06/14/2001	Order Denying Defendant's Motion for New Trial and Granting Defendant's Post-Trial Motion to proceed in Forma Pauperis on Appeal and Appointing Counsel on Direct Appeal filed. BK 44-582
06/27/2001	Notice of Appeal filed.
06/28/2001	Order filed. 45-12 (Board of Supervisors to pay Supreme Court $100.00)
07/02/2001	Notice to Court reporter to transcribe appellant's designation of record filed.
07/19/2001	Order Filed. 45-59 (Billy Stanford)
07/23/2001	Letter from Margaret Fair to Hon. Duncan Lott filed.
07/24/2001	Letter from Anita Moss to Hon. Lott filed.
07/27/2001	Order filed. 45-95 (to pay court reporter)

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2001-DP-01104-SCT

MARLON LATODD HOWELL,
Appellant,

v.

STATE OF MISSISSIPPI,
Appellee.

Union Circuit Court
Trial Court Case # UK-2000-82
The Honorable R. Kenneth Coleman
Ruling Date 3/30/2001

DOCKET ENTRIES

DATE	PROCEEDINGS
6/27/2001	Notice of Appeal Filed
7/13/2001	Notice of Retention by the Supreme Court
7/13/2001	Case Info Sheet received
7/13/2001	Notice of Criminal Disposition
7/13/2001	Trial Court Order received
7/13/2001	Trial Court Order received
7/13/2001	Correspondence received—Trial Court Clerk—Hon. Billy Stanford
7/13/2001	Final Judgment
7/13/2001	Docket Entries

DATE	PROCEEDINGS
7/13/2001	The Death Penalty Questionnaire has been issued.
7/16/2001	Court Reporter Transcript Due Date issued—Maggie Fair
7/16/2001	Court Reporter Transcript Due Date issued—Anita Moss
7/23/2001	Appearance Form received—Duncan L. Lott
7/24/2001	Phone call
7/25/2001	Correspondence received—Court Reporter—Anita Moss
8/29/2001	Demand Letter Issued—Trial Court Clerk—Billy Stanford
9/12/2001	Correspondence received-James M. Hood, III
9/24/2001	Record Filed
9/24/2001	Briefing Schedule Notice Issued.
10/3/2001	Order Entered
10/4/2001	Death Penalty Questionnaire has been re-issued —Trial Court Judge—Kenneth R. Coleman
1/14/2002	Motion # 2002-222 Motion to Exceed Page Limitation of Appellant's Brief
1/17/2002	Clerks Notice Issued Motion # 2002-222
1/28/2002	Motion # 2002-468 Motion for Additional Time
2/4/2002	Appellant's Brief filed on behalf of Marlon Latodd Howell
2/4/2002	Record Excerpts filed on behalf of Marlon Latodd Howell

DATE	PROCEEDINGS
2/5/2002	Brief Addendum filed on behalf of Marlon LaTodd Howell
2/14/2002	Order Entered Motion # 2002-468
6/4/2002	Motion # 2002-2298 Motion for Enlargement of Time within which to file Appellee's Brief
6/12/2002	Order Entered Motion # 2002-2298
7/8/2002	Motion # 2002-2641 Motion for Enlargement of Time within which to File Appellee's Brief
7/11/2002	Order Entered Motion # 2002-2641
8/5/2002	Motion # 2002-2956 Motion for Enlargement of Time Within Which to File Appellee's Brief
8/12/2002	Response filed Motion # 2002-2956
8/20/2002	Order Entered Motion # 2002-2956
9/4/2002	Motion # 2002-3269 Motion for Enlargement of Time within which to File Appellee's Brief
9/9/2002	Order Entered Motion # 2002-3269
10/4/2002	Motion # 2002-3582 Motion to Suspend Rule 28(g) for Enlargement of Page Limitation
11/1/2002	Order Entered Motion # 2002-3582
11/1/2002	Appellee's Brief filed on behalf of State of Mississippi
11/12/2002	Motion for Time for Filing Brief—Duncan L. Lott
11/12/2002	Clerks Notice Issued
11/21/2002	Motion # 2002-4051 Motion for Additional Time
11/25/2002	Order Entered Motion # 2002-4051

DATE	PROCEEDINGS
1/9/2003	Reply Brief filed on behalf of Marlon Latodd Howell
3/26/2003	Case Argued and Submitted
3/27/2003	Argument Disk Received and Placed in Vault.
4/18/2003	Appearance Form received—Judy T. Martin
10/23/2003	DECISION: Affirmed
10/31/2003	Motion # 2003-3386 Rule 40 Motion for Rehearing
11/14/2003	Letter Issued by Clerks Office
12/18/2003	Rehearing Denied Motion # 2003-3386
12/29/2003	Mandate Issued
1/21/2004	Order Entered
1/23/2004	Motion # 2004-192 Motion for Clarification of Order
7/2/2004	Motion # 2004-1969 Motion to Recall and Stay Mandate

IN THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

[Filed March 26, 2001]

NO. UK-2000-82

STATE OF MISSISSIPPI,

VS.

MARLON LATODD HOWELL.

JURY INSTRUCTION D-13

If you fail to find the defendant, Marlon Howell, guilty of capital murder, then you should continue your deliberations to consider the elements of the felony crime of simple murder. If you find from the evidence in this case beyond a reasonable doubt that Marlon Howell on or about May 15, 2000, in Union County, Mississippi, killed David Pernell, a human being in the commission of an act imminently dangerous to others and evidencing a depraved heart, regardless of human life, without authority of law, even though the defendant had no premeditated design to affect the death of any particular individual, then you should find the defendant, Marlon Howell, guilty of murder. If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you should find the defendant, Marlon Howell, not guilty of murder.

If you fail to find the defendant, Marlon Howell, guilty of simple murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.

If you find from the evidence in this case beyond a reasonable doubt that:

1. Marlon Howell on or about May 15, 2000, in Union County, Mississippi;

2. Killed David Pernell;

3. By gunshot; and

4. Marlon Howell was negligent or acted with wanton disregard for human life, and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to the safety of human life; and

5. Such negligence or wanton disregard, if any, directly caused the death of David Pernell, then you shall find the defendant guilty of manslaughter.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

IN THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

NO. UK-2000-82

STATE OF MISSISSIPPI,

VS.

MARLON LATODD HOWELL.

JURY INSTRUCTION D-18

THE COURT instructs the jury that if you find the defendant, Marlon Latodd Howell, not guilty of "capital murder" as charged in the indictment, then you should continue your deliberations to determine whether the defendant, Marlon Latodd Howell, has committed the lesser crime of "simple murder."

The crime of "simple murder" is distinguished from the crime of "capital murder" by the absence of, or by the failure of the State to prove, the following element of the offense of "capital murder", to wit:

> the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell at a time when the said Marlon Latodd Howell was engaged in the commission of the crime of robbery of the said Hugh David Pernell.

THEREFORE, if you find from the evidence under this case beyond a reasonable doubt that:

1) Hugh David Pernell was a living human being; and

2) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell in Union County, Mississippi, on or about the 15th day of May, 2000; and

3) the defendant, Marlon Latodd Howell, acted unlawfully, willfully, and feloniously, without authority of law, and with the deliberate design to effect the death if Hugh David Pernell, then you shall find the defendant, Marlon Latodd Howell, guilty of capital murder.

If you fail to find the defendant, Marlon Howell, guilty of simple murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.

If you find from the evidence in this case beyond a reasonable doubt that:

1. Marlon Howell on or about May 15, 2000, in Union County, Mississippi;
2. Killed David Pernell;
3. By gunshot; and
4. Marlon Howell was negligent or acted with wanton disregard for human life, and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to the safety of human life; and
5. Such negligence or wanton disregard, if any, directly caused the death of David Pernell, then you shall find the defendant guilty of manslaughter.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

IN THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

No. UK-2000-82

STATE OF MISSISSIPPI,

vs.

MARLON LATODD HOWELL.

TRANSCRIPT OF JURY INSTRUCTION CONFERENCE
TRIAL TRANSCRIPT PAGES 968-987

[968] the case form or express any opinion.

(JURY OUT).

BY THE COURT: I know you have had an opportunity to go over at least be aware of each others instructions. I have an idea you save a lot of time to spend with them. But what do you anticipate on the instruction issue as far as the guilt phase. Do you see any real problems?

BY MR. LOTT: Your Honor, I think we are going to probably have some real issues concerning our issues on the robbery and the instructions of the court to the jury on those issues. And the underlying facts we may take a little bit to take care of that. I think we can take care of those in a reasonable amount of time but I don't think we would be able to do that and do closing arguments to the jury and get this case to them today. I would prefer ask the court to allow us to do closing arguments first thing in the morning and let them have it in the morning.

BY THE COURT: Well it's 3:25 now my experience has been in these types cases that even when I hear that we don't

have any problem with jury instructions we normally have a serious problem with jury instructions. So I don't doubt that this one will be a lot different than that. We will have the jury come [969] back in the morning at 8:30 and we will stay here and work on these instructions until we get them hammered out. And I might as well make my remarks now sooner or later. I guess everybody in here has tried cases with me before and y'all are all good lawyers, very capable and comparable lawyers and I am not going to spend my night y'all have that in mind when we start on jury instructions.

BY THE COURT: Let's have the jury.

(JURY IN).

BY THE COURT: Members of the jury it's according to my watch it's almost 3:30. And the State and the defendant have rested. The State is not going to have any rebuttal and as I indicated to you earlier when we were doing voir dire the next step in the jury trial process is the court will instruct you concerning the law as it should be applied to the facts of the cases as you have heard them during the course of this trial. Now, I wouldn't have you think that we are going to have to go back and start from scratch and research the law in great detail as to each one of these instructions that will be given but it does take some period of time and the course in a case of this magnitude sometime it can take a fairly lengthy period of time to get the instructions prepared. Quite frankly I doubt if we could get them prepared and get ready for closing arguments before 6:00 or 7:00 o'clock and we are just not going to do that. So I'm going to let you [970] go for the evening and I'm going to ask the bailiff to have you back here in the morning at 8:30 and we will be prepared at that time to hear the final arguments of the attorneys. Then I will and this will be only the guilt phase as I indicated to you. Then you will have an opportunity to hear the closing argument of the attorneys after you have been instructed by the Court then you will go back in the jury room and begin your deliberation

towards reaching a verdict if possible. Now I admonish you again under your oath as jurors don't discuss this case with anyone; don't allow anyone to discuss it with you or in your presence; don't read watch or listen go anything at all about this case in any news media of any kind. Certainly don't talk to anyone that has been identified as a party or witness or could have been a possible party or witness. And don't form or express any opinion concerning the guilt, or innocence of this defendant until you have heard the instructtions of the court and the argument of counsel. And I trust that you will have I pleasant evening. I will look forward to seeing you back here in the morning at 8:30. Show the jury out Mr. Armstrong. Everyone remain seated while the jury leaves.

(Jury Out)

INSTRUCTION NO. COURT-1:

BY THE COURT: The defendant is present his attorney's are present. State's attorneys are present. Let's look at these jury instructions just a minute. The court is going to give court instruction [971] number 1 this is which is just the Court's general instruction and I don't have a copy for y'all but if you want to look at it you are welcome to. You did have a copy of it. I haven't looked through these. Has anybody submitted a burden of proof instruction?

BY MR. LOTT: Yes, sir.

INSTRUCTION NO. COURT-2:

INSTRUCTION NO. COURT-3:

BY THE COURT: I will give our three then. Glad y'all have a copy of these. Two is the courts burden of proof instruction. I will give it. It's a little different than the one you were talking about. And then all right. Look at Court's four.

BY MR. HOOD: You are going to give your three, Your Honor.

BY THE COURT: Yes, sir.

INSTRUCTION NO. COURT-4:

BY THE COURT: And the Court's four which is 12 person verdict instruction or whatever.

INSTRUCTION NO. COURT-5:

BY THE COURT: And then five and five court will give courts instruction number. Then let's take a look at the State's instruction.

INSTRUCTION NO. S-1:

BY THE COURT: Then let's take a look at S-1. Have you had an opportunity look at S-1.

BY MR. LOTT: Yes, sir.

BY THE COURT: Have any objection to it.

BY MR. LOTT: Your Honor, in the second paragraph. The second paragraph says if you find from the [972] evidence under in this case I think that word under needs to come out. If you find from the evidence in this case. Mine has the word under.

BY THE COURT: Wait a minute. Let me see here now in the second numbered. So I will remove I will mark it out.

BY MR. LOTT: And the numbered paragraph number 3 we would object to the "or without" on the deliberate design. We think it's the proper should be with deliberate design should be some design or intent.

BY MR. HOOD: That case, *Berry versus State*, addresses that, Your Honor.

BY THE COURT: I think so. Unless you have something Mr. Lott that you can.

BY MR. LOTT: Cover my basis.

BY THE COURT: Given

INSTRUCTION NO. S-2:

BY THE COURT: S-2.

BY MR. LOTT: Your Honor, we would object to S-2 on the basis that numbered paragraphs 1, 2 and 3 refer to the attempt to take and the indictment as well as the court's instruction S-1 refers to that he was indicted and charged for committing a robbery. Not attempting and this would be a variance from the indictment and we would object to any reference to an attempted robbery.

BY MR. HOOD: Your Honor, the statutory definition of robbery includes, is inclusive of attempt and if you attempt to commit an armed robbery then all [973] though you don't complete it by actually taken that property it's still armed robbery. There is a statutory prohibition against indicting for attempts when the crime is complete the robbery is defined under 97-3-79 and it in the definition of robbery is the word attempt. Every person that shall feloniously take or attempt to take from the person so it's the State's would submit that the robbery was complete when the attempt occurred and under 97-1-9 it prevents us from charging some one with attempt. In other words we would if we had indicted him for attempted robbery and we actually proved that he committed robbery under the robbery statute then we would be we would have been out on directed verdict.

BY THE COURT: What about this fact that you have got it one way in one instruction and one in the other.

BY MR. HOOD: I believe we ought to have it consistent. I didn't notice any inconsistencies. We would move to correct.

BY THE COURT: It says robbery. Doesn't go into that business. All right, your objection is noted. I will give the instruction.

BY MR. LOTT: For the record, I want to make one other point on that deal. I do not believe that the capital murder

statute provides for attempted robbery as an underlying felony. It allows for robbery so that would be in addition

[974] INSTRUCTION NO. S-3:

BY THE COURT: S-3.

BY MR. LOTT: Your Honor, mine that I have for the State are unnumbered. Which one is that.

BY THE COURT: It's the one that says lessor included offense of simple murder.

BY MR. HOOD: We were planning on withdrawing that one, Your Honor, if that is S-3. We don't believe there is any evidence to support a murder.

BY THE COURT: Do you want to withdraw it that is what you said.

BY MR. HOOD: The one that I have aren't numbered.

INSTRUCTION NO. S-4, AND S-5:

BY THE COURT: Only thing I have left is S-6. All I have is S-6. Christine said you had withdrawn S-4 and 5. 6 is form of the verdict.

INSTRUCTION NO. S-6:

BY THE COURT: 6 is the form of the verdict. All 12 of you must agree the verdict should be written, if you find from the evidence quote we find him guilty or quote we find him not guilty. The form of the verdict instruction.

BY THE COURT: Given. Let me see the defendant's instructions.

BY MR. LOTT: Your Honor, on S-6 I got one page. Do you have more than one page?

[975] BY THE COURT: No, sir.

BY MR. LOTT: So paragraph three is the end of that that is S-6 that has been submitted. We would object to S-6 on the

basis that it does not include the lessor offense of simple murder and then also we would object t[illegible]t that it does not include the lessor offense of manslaughter. We think under the testimony that has been presented to this jury they could reasonably return a verdict on either one of those instead of capital murder. And also if they failed to find either one of those, I think the instructions got to advise is just if they fail to find him guilty or something to the effect that he was I think the jury needs to be advised judge that if they find he wasn't present when Mr. Pernell was killed. He is not guilty period and they could cease their deliberations and we prepared such.

BY MR. HOOD: That is in your alibi.

BY MR. LOTT: It's in the alibi but it's not instructing they can do that. Your Honor, the State's previous instructions number 3 that y'all previously withdrew I think that is a proper instruction for simple murder.

BY THE COURT: Let me look at your form of the verdict that you submitted.

BY MR. LOTT: Well, Your Honor, the form of the verdict that I have. He has instructions on the lessor included offense.

BY MR. LOTT: I think S-3 should be [976] given I know the State withdrew it. I know S-3 should be given on the issue of simple murder. We have an instruction that incorporates S-3 that we would withdraw down to the part about the manslaughter that we think should be given in addition to the simple murder which is defendant's 13 which is one we referred to simple murder and then went on to refer to man slaughter. I would agree to the State's S-3 on the issue of simple murder but I would ask that we also include our paragraph about manslaughter in addition to that.

BY MR. LUTHER: Until we get to the issue of lessor included offenses decided we can't be the one with the form

of the verdict basically we got to see how many options we have before we come up with the form of the verdict.

BY THE COURT: I'm going to hold instruction S-6 but I'm going to look at your instructions.

INSTRUCTION NO. D-1 AND D-2:

BY THE COURT: D-2.

BY MR. HOOD: I had D-1.

BY MR. LOTT: That was the same as court's 3 we agreed to withdraw one for the courts 3.

BY MR. HOOD: Your Honor, this instruction was condemned in *Barns versus State*. It is an unreasonable invasion of the province of the jury to determine what is a reasonable duty where it talks about the language of mere probability of guilt. Is an [977] invasion of that. Barns is that *Barns versus State* is at 532 So.2d 1231 specific page site 1235. It's a Mississippi 1988 Supreme Court case and it was a murder and the court stated the reasonable doubt defines itself and therefore needs no definition by the court. And the actual language in that Barns instruction where the court properly was found to have refused it contained similar language that specifically quoted in that Barns decision. It was the court's instruction the jury that if you believe from the evidence in this case that there is a probability of innocence of the defendant then there is a reasonable doubt. It goes on and contains language similar to that contained here. I do know of one case in which our Supreme Court has upheld a definition of reasonable doubt and that is *Conner versus State*. And of course this doesn't contain that language but I believe in Conner at page 12 well Conner is at 632 So.2d. 1256 and 57. Wherein the court upheld this instruction which says the court instructs the jury that a reasonable doubt of guilt may arise either from the evidence or lack of evidence or conflict of the evidence. And if upon consideration of all the evidence in this

case or lack of it or the conflict of it such reasonable doubt does exist then it is your sworn duty as jurors to return a verdict of not guilty. That, Your Honor, I believe is only.

BY THE COURT: I am going to give the instruction. I am going to amend it by the first complete sentence after of the period strike out [978] beginning with the word "there". Strike the next two sentences and the last one of which ended with the word "defendant". That is as I recall those cases but that is what I remember about it. And I will strike this out. If y'all want to submit a clean copy in conformity you can with the strike that will be all right to but I do have something that I can mark it completely out with. Be given as amended.

INSTRUCTION NO. D-3: D-3.

BY MR. HOOD: This is the weight of the evidence instruction and I particularly, I believe first instruction were to cover how to address testimony but I know that this last paragraph has been held in *Bell versus State*, 411 So.2d, page 463, specific page 765. It's a Mississippi Supreme Court case 1982 wherein the court held it was proper to refuse a comment on the weight of the evidence in which in that decision the actual instruction that was rejected is quoted as being, saying the court instructs the jury that it's your duty not to consider the quantity of the witnesses testifying but rather the quality of their testimony. I submit to the court what this instruction is saying is the same thing, you may find that your testimony smaller number of witnesses on any fact more credible than the larger number. I don't think it's proper to comment on the weight of the evidence and I think that whole instruction does that but, I know, particularly about that quantity and quality that was rejected in Bell.

BY THE COURT: All right. I am going to [979] refuse the instruction.

INSTRUCTION NO. D-4:

BY THE COURT: D-4.

BY MR. LOTT: We would withdraw 4.

BY THE COURT: Withdrawn four.

INSTRUCTION NO. D-5: D-5.

BY MR. HOOD: Your Honor, I believe that's proper statement of the law. We don't object to it.

INSTRUCTION NO. D-6:

BY THE COURT: D-6.

BY MR. LOTT: We will withdraw D-6, Your Honor.

INSTRUCTION NO. D-7:

BY THE COURT: D-7.

BY MR. HOOD: Your Honor, I think it's a comment on-the evidence. It talks about the credibility an impeached testimony it talks about proof of general bad character.

BY THE COURT: I don't recall it being supported by the evidence. Unless defense counsel if they can provide me with some case that this has been given.

BY MR. LOTT: This was a model jury instruction that I got out of our book. I think it's warranted in this case because we did have Mr. Cox on the issue of impeaching the testimony of Mr. Lipsey. We have had issues concerning motives of witnesses and criminal cases. There are felony convictions that are [980] pending and I think it's proper for the jury in this case specially with the testimony we had to be instructed on this point.

BY THE COURT: I will give the instruction.

INSTRUCTION NO. D-8:

BY THE COURT: D-8.

BY MR. HOOD: We would object to this instruction on—case.

BY THE COURT: I am going to refuse the instruction.

INSTRUCTION NO. D-9:

BY THE COURT: D-9.

BY MR. HOOD: Your Honor, this is an if you will indulge me until I find a page cite.

BY THE.COURT: What is wrong with it Mr. Hood.

BY MR. HOOD: I was thinking that this was one of those that talked about the defendant is a witness in his own right.

BY MR. LOTT: Your Honor, this came out of model jury instructions. I know I don't know enough.

BY THE COURT: I am going to give it. All right.

INSTRUCTION NO. D-10:

BY THE COURT: D-10 alibi.

BY MR. HOOD: Your Honor, I don't have any objection to it other than on the very last full line it says the defendant has the benefit of any [981] reasonable doubt. I would request that sentence be stricken and use proper burden of proof a reasonable doubt.

BY THE COURT: Given as amended.

INSTRUCTION NO. D-11: D-11.

BY MR. HOOD: We would object to it, Your Honor. It's not supported by the facts. The defendant in this case did not testify.

BY MR. LOTT: There were statements about a testimony about a statement he gave though judge. And I think and the statement is in essence it's kind of an unusual situation. The statement has not had anything to do with the commission of a crime. It really has to do with the alibi. So I think

it's all the more reason that they should be instructed that that statement should not be used to consider whether or not he committed.

BY THE COURT: Which statement are you talking about. I am talking about the one where they said he was at some girls house. It's not a statement where he is implicated. It's usual sense when we have somebody giving a statement implicating themselves in a crime.

BY THE COURT: I will refuse the instruction. You have it for the record.

INSTRUCTION NO. D-12: D-12.

BY MR. LOTT: We are withdrawing 12, Your Honor.

INSTRUCTION NO. D-13:

BY THE COURT: D-13.

[982] BY MR. LOTT: Now 13 is the one that I mentioned to you earlier first part pertains to the simple murder and I think the State's S-3 that was previously submitted and withdrawn would be a better instruction on the simple murder. However the last paragraph concerning the felony of manslaughter we would ask that that be joined with S-3 or if the court determines that manslaughter is not proper then we are submitting that simple murder is proper. I don't want a commingle with what manslaughter and the other and have them both effectively removed. I think it's a case by case situation.

BY MR. HOOD: We object to both request for a murder and manslaughter instruction. We object to a simple murder instruction and we object to a man slaughter instruction because neither of those instructions are supported by the evidence. We don't we couldn't prove simple murder if we wanted to. We don't have any. We don't have the intent. The murder to prove a simple premeditated murder. So, that is why I say that it's not a murder. This instruction is not supported by the facts of this case. They didn't know the

victim so obviously he didn't have any other than to rob them and kill him other than the robbery motive. So therefore we are saying that there is no evidence of premeditation and deliberate design which is a necessary element to prove simple murder. Whereas the evidence is sufficient to prove capital murder. And I believe the same thing would go for a manslaughter [983] instruction if the instruction they have submitted is based upon a negligence, gross culpable negligence manslaughter. We disagree that they should-be entitled to that instruction because if you are committing the crime of armed robbery and regardless of whether it's negligence or whatever, whatever this case is whether it's with or with out deliberate design and you kill some one you are guilty of capital murder and not manslaughter.

BY MR. LOTT: Judge, I agree with him but the point that I think is going to be argued strongly by us is there is no proof of a robbery.

BY THE COURT: They are putting their burden on that.

BY MR. LOTT: But then they say well there is no proof of a robbery but we think he shot this man what is the jury going to do then.

BY MR. HOOD: Their defense is not that this man shot him. There defense is alibi.

BY MR. SMITH: We are entitled to bring up whatever defenses we want. Mr. Rice testified there was absolutely nothing to believe there was a robbery going on. This jury can find that this man was there and did shoot Mr. Rice. But that, I mean Mr. Pernell but based on Mr. Rice's testimony there was no robbery going on and therefore whatever for whatever reason he shot him it's manslaughter.

BY THE COURT: I'm going to refuse the instruction. That leaves. I'm going to put D-6 [984] back on the table and y'all are going to have D-2 retyped as I understand it.

BY MR. LOTT: Are you refusing our request to use State's 3 that was withdrawn also.

BY THE COURT: Yes, sir.

BY THE COURT: All right.

BY MR. LOTT: Would you like for me, Your Honor, since I'm going to have her type that other one submit an instruction tomorrow so you can rule on it.

BY THE COURT: You do not need to do it unless you want to do it for the record. Here is your you have a note. Okay in the morning. Get here a few minutes.

BY THE COURT: Let me ask y'all this—

INSTRUCTION NO. D-l5, D-16, D-17:

BY MR. LOTT: Judge I'm sorry. 15, 16, 17, and I am withdrawing 15 but I'm going to give it to you. D-16. I think he did send him to us.

BY THE COURT: I am going to refuse instruction D-16 unless you have some authority that you sprung on me that I haven't found any authority for it any where.

BY MR. LOTT: It's would be from another jurisdiction. It's not from Mississippi.

BY THE COURT: It will be refused and it may wind up being the law in this State some day but, I don't think it is right now. 17.

BY MR. HOOD: Your Honor, there was a case styled *Warren versus State* in which the court held [985] or court approved a similar eye witness instruction or similar eye witness instruction that *Warren versus State*, I don't have the, it's a Mississippi 1998 Supreme Court case. It had about five elements that you had to consider and I know Mr. Lott has proposed three. I believe a couple are left out. Such as how certain is the witness of the identification. So I would like to

submit the instruction that has been approved and all I have is a copy of it in booklet, if I can let counsel read it may be they can agree to it.

BY THE COURT: Y'all take a look at it and we will be here about 10 minutes before time and y'all choose one of those or something. Okay. In the morning.

(OVER NIGHT RECESS WAS TAKEN).

BY THE COURT: How long are y'all going to want to argue by the way.

BY MR. HOOD: 45 minutes to the side.

BY MR. LOTT: I kind of feel like I will need 45 minutes. 45 to the side and the State will divide theirs.

BY MR. LOTT: Mr. Smith and I will divide ours.

BY THE COURT: And everybody wants what kind of warning?

BY MR. LOTT: I would like about I needs about five with mine also. Mr. Smith, will go first and I will last. State wants to on each segment.

[986] BY THE COURT: We want to go back and finish these instructions that we lack a few on. The State submitted two new instructions

INSTRUCTION NO, S-8, S-9:

BY THE COURT: Let's take the State's instructions first then. S-8. Mr. Lott, Mr. Smith, have you had an opportunity to look at it.

BY MR. LOTT: Yes we have. We would intend duplicate of D-17 on identification testimony: I believe it's D-17, Your Honor. They both touch the same basis. I think they are both good instructions. I think the court can decide which one.

BY MR. HOOD: Judge, this instruction came out of a quote and I have it here. It's *Davis versus State*, 568 So.2d 277. It's a Mississippi Supreme Court case 1990. The State would submit that D-17 does not contain the additional two considerations for the jury to consider. In Davis they listed five. And I will give you Davis. And this is where they quote that language. It doesn't contain the five elements at the bottom.

BY THE COURT: I am going to refuse D-17 and I will give S-8. S-9.

BY MR. LOTT: Your Honor, S-9 is, I don't have any objection.

BY THE COURT: Be given. All right.

INSTRUCTION NO. D-17: Now let's take a look at the instructions submitted by the defendant this morning.

[987] This D-17 is preemptory instruction.

BY MR. LOTT: Yes, sir.

BY THE COURT: It will be refused. D-2 is instruction as amended. Have y'all looked at the amendment on it.

BY MR. HOOD: Yes, sir, I believe it's properly amended to the courts instruction.

BY THE COURT: Be given.

INSTRUCTION NO. D-18: D-18.

BY MR. LOTT: Your Honor, D-18 is just a for the sake of the record and recompilation of what I asked.

BY THE COURT: I see. I will refuse it then for part of the record.

BY THE COURT: So that we are all on the same page. Mr. Hood, Mr. Lott, you had something.

BY THE COURT: Court instruction 1. It's not in any particular order. Court instruction number 1, number 3. Number 2. Defendants 2. S-9. D-5. D-7. S-8. D-10. D-9, S-1, S-2. S-6. Court's instruction 4 and court's instruction 5. Is that what everybody's record reflects.

BY MR. LOTT: Did one of those contain the form of the verdict.

BY THE COURT: S-6. And I believe y'all wanted 45 minutes each. You are going to evenly divide. You wanted two minute warning for the

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IN THE SUPREME COURT FOR THE
STATE OF MISSISSIPPI

No. 2001-DP-1104-SCT

MARLON LATODD HOWELL
Appellant,

vs.

STATE OF MISSISSIPPI
Appellee.

APPEAL FROM THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, MARLON LATODD HOWELL

ORAL ARGUMENT REQUESTED

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XIV. THE COURT ERRED IN ALLOWING STATE INSTRUCTION S-6 WHICH DID NOT INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SIMPLE MURDER AND MANSLAUGHTER AND THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S INSTRUCTION D-13 AND D-18 ON THE CRIME OF SIMPLE MURDER AND MANSLAUGHTER.

The Court in failing to give defendant's Instruction D-13 (R.E. 98-99) and Instruction D-18 (R.E. 100-101), and allowing State's instruction S-6 (R.E. 102) all of which failed to give the defendant an instruction on the offense of simple murder or manslaughter is the crux of Issue No. XIV. This Court in *Conner v. State*, 632 So.2nd 1239 (Miss. 1993) discusses when lesser included offense instructions should be granted. The Court noted:

> Lesser included offense instructions should be granted unless the trial judge and ultimately the Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence that a reasonable jury could find the defendant guilty of a lesser included offense.

This Court in *Harveston v. State*, 493 So.2nd 365, 373 (Miss. 1986) held that giving a lesser included instruction was appropriate where the jury could have and did find that *Harveston* did not commit the murder in the course of a robbery. Although in *Edwards v. State*, 737 So.2nd 275, 311, (Miss. 1999) this Court found that a lesser included instruction was not warranted, that decision was based upon no evidence indicating that the victim was killed in any context but an armed robbery. As previously mentioned in assignment of error No. XII, the record is void of any testimony from co-defendants, Ray and Lispey, that when Pernell's vehicle was stopped Howell intended to rob him or made any

reference of a desire to rob Pernell. In fact, the only evidence of Howell's desire to stop Pernell was that he knew him. Also, the proof is undisputed that Howell did not approach Pernell's vehicle with a gun drawn nor did he have a gun drawn while he talked with Pernell as observed by eyewitness, Rice. It was not until Howell jumped back from Pernell's car, threw his hands up in the air, and then came down and pulled a gun from his waistband and shot Pernell did Rice even realize anything was unusual or suspicious about what he was observing in front of his house. The testimony from co-defendant, Lipsey, indicated that when Howell came back to the car he stated Pernell had sprayed him with mace and that he then shot him. The record is void of any statements from Howell to Ray or Lipsey to stop Pernell's car because he was going to rob him or any statements from Howell after the incident that he intended to rob Pernell. When this evidence is taken in "the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence." The jury could have found and returned the lesser included offense of simple murder or manslaughter. The fact remains that if this jury had believed Howell approached Pernell's vehicle to sell him drugs and was sprayed in the face with mace by Pernell in reaction, then they could have returned a conviction on manslaughter. The Court's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had not choice but either to turn Howell loose or convict him of Capital Murder, with the former being an unacceptable choice in Union County for this crime.

XV. THE COURT ERRED IN REFUSING TO GRANT HOWELL'S INSTRUCTION D-3 ON WEIGHT OF THE EVIDENCE INSTRUCTION, IN

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